Supreme Court, U.S.
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No. 94-784

In The

Supreme Court of the United States

October Term, 1994

THE TOWN OF LONGBOAT KEY,

Petitioner,

v.

THE RESERVE, LTD.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF IN OPPOSITION

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LISTING OF PARTIES

The Reserve, Ltd., is a Florida limited partnership. The Reserve Development Corporation, a Florida corporation, is the general partner. Dr. Murray Klauber is the only shareholder in The Reserve Development Corporation. Dr. Murray Klauber is the only limited partner in The Reserve, Ltd.

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CONCISE STATEMENT OF THE CASE

The Town's statement of the case attempts to make this a garden-variety land use case. Given more than 4,500 pages of deposition testimony, over 5,000 pages of exhibits, and the Eleventh Circuit's opinion in the subject case, the Town should know better.

Briefly put, the facts are that in February 1986, the Town commission passed a resolution approving a site plan for the Reserve to construct 72 condominium units and a world class spa on privately-owned property within the Town. In February 1987, the Reserve obtained a building permit to construct the first 57 of the condominium units and the spa. In March 1987, the Reserve received a building permit to demolish 102 units in 23 preexisting buildings on the subject property in order to proceed with constructing the condominium units and spa. In April 1987 and again in November 1987, the Town commission approved revised and amended site plans for the condominiums and spa, again specifically finding that the site plans were consistent with the Town's comprehensive plan, with the Town's zoning, and with good design standards. In reliance upon the Town's approvals and building permits, the Reserve spent well over $6 million in financing the subject property, in designing the world class spa and condominiums, in demolishing the pre-existing buildings, in site work and grading, and in construction, including more than 400 pilings and pile caps.

By the mid 1980s, Dr. Murray Klauber, the principal in the Reserve, had become the object of the Town's

attention due to his primary identification with the commercial/tourism industry in the Town, a highly controversial and politicized subject in the Town, and due to his political activities within the Town. As the Eleventh Circuit summarized,

> "[t]hroughout the 198Os, Reserve's principal, Dr. Murray Klauber ("Dr. Klauber"), was involved in numerous disputes with Longboat Key over matters unrelated to the spa project. In addition, Dr. Klauber was active in politics in Longboat Key in the 1980s. Beginning as early as 1984, Dr. Klauber opposed the candidacy of several members of the Longboat Key Commission. By 1988, Dr. Klauber's relationship with Longboat Key was, at best, strained" (Town appendix at 3).

More specifically, as early as 1984, Dr. Klauber visibly and financially had backed candidates opposing Commissioners Fernald, Pollock, Wurzburg, and Stewart (the four commissioners who in 1988 and 1989 would be involved in revoking and refusing to reinstate the building permit for the condominiums and spa). Dr. Klauber was instrumental in March 1985 in helping to defeat the no-growth, anti-tourism, anti-commercial candidates for the Town commission. In 1986, Dr. Klauber made accusations that "an invisible government" of non-elected persons was controlling the Town commission. In March 1986, however, the no-growth, anti-tourism, anti-commercial candidates were elected and resumed control of the Town commission. Shortly thereafter, the Town became involved in numerous disputes with Dr. Klauber, including disputes concerning flying American flags and installing speed bumps to protect children at the Colony Beach

and Tennis Resort which Dr. Klauber operated. Dr. Klauber has been involved in politics in the Town, even though Town employees have advised him that it would be in his best interests to stay out of politics. Town employees testified that Town commissioners "definitely expressed prejudices" against Dr. Klauber, had "negative attitudes against Dr. Klauber," and "viewed Dr. Klauber as a political adversary."

Notwithstanding the Reserve's substantial work and expenditures in connection with constructing the subject project and in order to retaliate against Dr. Klauber in light of his political activities, his identification with commercial tourism within the Town and the disputes between Dr. Klauber and the Colony, on the one hand, and the Town, on the other hand, the Town proceeded to thwart the Reserve's attempt to develop the subject property. Specifically, on May 10, 1988, the Town notified the Reserve that it had until June 5, 1988 (a Sunday) to accomplish "substantial work" on the subject property even though the Reserve had until February 1990 to complete construction of the subject project pursuant to the Town's approval of the site plans and even though the Town had never enforced the ordinance requiring "substantial work" every 30 days. In light of its substantial financing and construction commitments concerning the subject property, the Reserve immediately contacted the Town upon receiving the notification to determine what the Town considered "substantial work." In reliance upon the Town's representations, the Reserve contracted and prepaid to have five pile caps constructed. By June 3, 1986, the contractor was working on the pile caps, had done stakeout, and had forms and materials on site.

Notwithstanding the facts that "substantial work" was being done, that the contractor had informed the Town that work was proceeding on the caps, that one cap was poured, and that the other four caps would be poured forthwith, that the contractor had, in fact, a backhoe and four men working on the caps on the morning of June 6, 1988 (a Monday), and that the Town knew that revoking the permit would cause substantial damages to the Reserve, the Town purported to revoke the building permit for the 57 condominium units and spa on Monday morning, June 6, 1988.

Immediately thereafter, Dr. Klauber asked the Town's public works director what could be done to have the permit reinstated. The public works director responded that the permit would never be reinstated. On June 22, 1988, the Reserve notified the Town in writing that the Town improperly revoked the building permit, but hoped the matter could be resolved amicably. The Town, rather than reinstating the building permit as was its practice even where building permits had been revoked after many months of no activity, reconfirmed its decision to revoke the building permit. Not only did the Town refuse to reinstate the building permit, the Town called upon the Reserve's letter of credit for $157,772 purportedly to *remove* the 400-plus piling which the Reserve had installed on the subject property even though the pilings could be cut off at much less cost, even though there was no public interest in removing the pilings from the subject property, and even though it would be unprecedented to remove the pilings from the subject property.

Other evidence indicating that the subject case is far from a garden-variety land use case and that the permit

revocation here was arbitrary, capricious and irrational and was designed to retaliate against Dr. Klauber were the facts that (1) the Town did not revoke building permits on other projects (Cedars, Beaches, Promenade) even though there were periods of no activity substantially longer than 30 days (no activity for well over one year at Promenade and Beaches and for over nine months at Cedars), (2) no witness, including seven Town employees, could cite one single incident, in Longboat Key or elsewhere, where a government has revoked a building permit where, as here, workmen and equipment were on site, (3) even where permits were ultimately revoked *after many months of inactivity* at Cedars and Promenade, the Town reinstated those permits, (4) the Town told the Reserve on *May 10, 1988,* that it had *30 days* to complete five pile caps, but revoked the permit on *June 6, 1988,* (5) the Town applied *ex post facto* an ordinance it passed on May 19, 1988, in revoking the permit, (6) the Town's public works director testified that he "would have no reason to revoke" a permit if workmen were on-site, as here, (7) the Reserve, as approved, was consistent with the Town's comprehensive plan, the Town zoning code, and good design standards, (8) the Reserve, as permitted, would have been favorable for Longboat Key, (9) the Town singled out the Reserve to be monitored daily, (10) the Town insisted for almost 13 months that the Reserve pull some 400 pilings from 40 to 50 feet into the ground, rather than cut the pilings off at ground level, even though pulling the pilings would cost the Reserve at least $150,000, compared to $30,000 to cut the pilings, even though no witness, including six Town employees, could cite one single incident, in Longboat Key or elsewhere,

where a government has attempted to make a landowner "restore" a site by pulling pilings from the ground rather than cutting pilings off, and even though the Town permitted other landowners to "restore" properties by cutting pilings off, (11) virtually the only two reprimands ever to Town employees stemmed from their involvement in issuing the building permit to the Reserve, (12) shortly after the building permit was issued, the Town began an "investigation" into the issuance of the building permit, the only such investigation ever in Longboat Key, (13) Commissioner Fernald suggested to the Town manager that Mr. Lovett should be fired for issuing the building permit to the Reserve, (14) the Town manager testified that he was "sick" of Dr. Klauber, and (15) Town officials used to "joke" about requiring the Reserve to "restore" the 23 dilapidated rat-infested buildings of the Far Horizons in order to restore the site.

Because of the Town's revocation of the building permit and the Town's refusal to reinstate it, the Reserve had no choice but to contract to sell the subject property. Because of the Town's revocation of the building permit and the Town's refusal to reinstate it, foreclosure proceedings were begun against the Reserve, the Reserve lost financing, and the Reserve was unable to proceed with the project in light of newly-imposed coastal construction requirements.

In addition to being incomplete and misleading, the Town's statement of the case also strays from the record. There is no support in the record for any of the Town's statements in the last paragraph on page 3 of its petition for certiorari (1) that the Reserve requested a later development approval, (2) that the Town commission

approved a site plan for a new project, and (3) that the Reserve sold the real estate six years later to an unrelated third party.

Finally, although the Town has raised no question concerning "ripeness" in the petition for certiorari, the Town gratuitously claims at pages 2 and 3 of the petition that "[s]everal sections of the Town Code provide relief to the Reserve for the revocation of the permit," that the Reserve never sought revalidation of the permit from the public works director pursuant to Town Code 150.34(C), that the Reserve never requested a vested rights determination from the Town commission pursuant to Town Code 158.032, and that "it is undisputed that Reserve never sought a Town Commission vote regarding the return of its building permit." Again, the Town is simply factually wrong. The Eleventh Circuit noted that, while the Reserve may never have submitted "formal" requests for revalidation and determination of vested rights (Town appendix at 17), the Reserve "did contact Longboat Key on several occasions in an endeavor to have the Permit restored," that "the record is rife with references to informal efforts by Reserve to have its permit returned," and that "Reservo's informal challenges to the revocation of its permit may have rendered a formal request futile. . . . " (Town appendix at 18-19). The Eleventh Circuit left the "question [whether the futility exception applies] for the district court to grapple with on remand" (Town appendix at 19).

REASONS FOR DENYING THE WRIT

1. The case is not ripe for review.

Because the Eleventh Circuit vacated the summary judgment as to Counts II, III, and IV, and remanded to the district court for further proceedings (Town appendix at 20), the subject case "is not ripe for review by this Court." *In Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock Railroad Co.*, 389 U.S. 327, 328 (1967), citing *Hamilton-Brown Shoe Co. v. Wolf Brothers & Company*, 240 U.S. 251, 257-258 (1916) and denying the petition for writ of certiorari, this Court held that "because the Court of Appeals remanded the case, it is not yet ripe for review by this Court." More recently, in connection with denying the petition for a writ of certiorari in *Virginia Military Institute v. United States*, 113 S.Ct. 2431, 2432 (1993), Justice Scalia observed that "[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction." Justice Scalia cited *American Construction Co. v. Jacksonville T. & K.W.R. Co.*, 148 U.S. 372, 384 (1893), where this Court noted that "many orders made in the progress of a suit become quite unimportant by reason of the final result or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." Here, the Eleventh Circuit remanded the subject case to the district court, there has been no stay of the Eleventh Circuit's mandate, the mandate has issued, and the district court has directed the

clerk to enter a scheduling order for discovery, p[retrial and trial.

As the Reserve points out at pages 9-20 below, there is no split of authority. Even assuming, however, that the Town were correct and that a split of authority exists, this case presents an inauscpious vehicle for resolving the split. There has not yet been a full-development of the factual record, such that this Court would have the full benefit of findings on the Town's motives and actions – findings that this Court would then be able to apply to whatever legal standard this Court might choose to adopt. Given this case's current posture – including the fact that it has been remanded on issues not raised in the subject petition for certiorari – it is clearly not yet a suitable vehicle for addressing the legal issue sought now to be raised. Thus, this Court should deny the Town's petition because the petition is not ripe.

2. The courts of appeals are unanimous that a government cannot constitutionally revoke a building permit to retaliate against a landowner for exercising his constitutional rights.

The Town claims that the United states Courts of Appeal are "split over when to invoke substantive due process in land use cases" (petition at 4). Though there may be some nuances and differences within the courts of appeals, case law is clear that the courts of appeals universally provide constitutional protection where, as here, a government attempts to retaliate against a landowner for exercising constitutional rights.

Without exception, federal courts have held that governments cannot use land use and zoning to punish a landowner for exercising his constitutionally protected rights of political involvement and of free speech. *See, e.g., Gagliardi v. Village of Pawling*, 18 F.3d 188, 194-195 (2d Cir. 1994) (reinstating complaint that village's zoning enforcement actions "were motivated by or substantially caused by the Gagliardis' exercise of their First Amendment rights"); *Brady v. Town of Colchester*, 863 F.2d 205, 208, 215, 216 (2d Cir. 1988) (reversing summary judgment where landowner claimed permits denied "for purely *political and improper reasons*," and for "impermissible political animus"); *Bello v. Walker*, 840 F.2d 1124, 1129-1130 (3rd Cir.), *cert. denied*, 488 U.S. 891 (1988) (reversing summary judgment against landowner's due process claims; "The deliberate and arbitrary abuse of government power violates an individual's right to substantive due process. . . . [Plaintiffs] presented evidence from which a fact finder could reasonably conclude that certain council members . . . improperly interfered with the process by which the municipality issued building permits, and that they did so *for partisan political or personal reasons* unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation. . . . "); *Neiderhiser v. Borough of Berwick*, 840 F.2d 213, 217 (3rd Cir.), *cert. denied*, 488 U.S. 822 (1988) (holding that denial of "special zoning exemption based on an *improper reason* – the fact that Hollywood as part of its business rented and sold x-rated movies . . . deprived Hollywood of its right to free expression and due process"); *Wilkerson v. Johnson*, 699 F.2d 325, 328 (6th Cir.

1983) ("[t]he regular and impartial administration of public rules . . . prohibits the subtle distortions of prejudice and bias as well as gross governmental violations exemplified by bribery and corruption *and the punishment of political and economic enemies through the administrative process*"); *Cordeco Development Corp. v. Santiago Vasquez*, 539 F.2d 256, 260 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976) (holding that landowner was denied due process when permit denial was "based on *illegitimate political considerations*," "there was ample evidence that [government officials] acted *maliciously* and wantonly, and with *illegitimate political, or at least, personal motives*"); *Board of Managers of the Glen Mills School v. West Chester Area School District*, 838 F.Supp. 1035, 1046 (E.D. Pa. 1993) ("[w]hile the existence of bias, bad faith, or an improper motive is a strong indicator that a particular governmental action was arbitrary or irrational, any governmental land use decision which is based on considerations other than those related to land use planning may form the basis for a substantive due process claim"); *Zaintz v. City of Albuquerque*, 739 F.Supp. 1462, 1470-1471 (D.N.M. 1990) (denying summary judgment against substantive due process claims where city required plaintiff to "strictly comply," but permitted plaintiff's competitor to be "in clear violation" due to "*political favoritism*" or "motivated by political or other arbitrary reasons").

The lower federal courts' consistent rulings are certainly consistent with precedent from this Court. *See, e.g., Rankin v. McPherson*, 483 U.S. 378, 383 (1987) (holding that discharge of clerical employee in constable's office for remarking that "[i]f they go for [President Reagan] again, I hope they get him" was unconstitutional; "[e]ven

though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional rights to freedom of expression"); *Cleburne v. Cleburne Living Center. Inc.*, 473 U.S. 432, 447 (1985) (indicating that government action "to harm a politically unpopular group is not a legitimate state interest"); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests-especially his interest in freedom of speech. . . . "); *Pickering v. Board of Education*, 391 U.S. 563, 574 (1968) ("a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal").

Notwithstanding the Town's claim in its petition, almost all federal courts of appeals have held that "an arbitrary, capricious or illegal denial of a building permit states a substantive due process claim under § 1983. . . . " even in the absence of a retaliatory claim as is involved here. *Littlefield v. City of Afton*, 785 F.2d 596, 604 (8th Cir. 1986). In fact, as the Eighth Circuit has observed, "all but the First Circuit generally recognize such claims." *Id.* Indeed, the Eighth Circuit noted that even the First Circuit has recognized such a claim where the government had failed to act due to "illegitimate political considerations." *Id.* at 605, citing *Cordeco Development*. The Eighth

Circuit went on to note that it was "persuaded by the almost unanimous decisions of our sister circuits that the denial of a building permit under some circumstances may give rise to a substantive due process claim." *Id.* at 607.

Again, those lower court decisions are consistent with this Court's precedent. As this Court has noted, a landowner has the constitutional right "to be free of arbitrary or irrational zoning decisions." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S, 252, 263 (1977).

The Town claims that the subject case "squarely conflicts" with *RRI Realty Corp. v. Incorporated Village of Southampton*, 870 F.2d 911 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989), *Pearson v. City of Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992), and *Gamble v. Eau Claire County*, 5 F.3d 285 (7th Cir. 1993), *cert. denied*, 114 S.Ct. 1096 (1994) (petition at 6). There is no conflict. In *RRI*, the Second Circuit, in a two-to-one decision, held that a permit *applicant* had no "such . . . clear entitlement to the permit to establish a property interest. . . . " 870 F.2d at 912. The Second Circuit pointed out that property may include "not only what is owned but also, in some limited circumstances, what is sought." 870 F.2d at 915. Here, of course, the Town had issued the permit, and the Reserve had expended more than $6 million in reliance on the permit, thereby establishing the property interest as a matter of Florida law. *Pearson* specifically disavowed the district court's "rationale that all federal zoning cases should be treated as 'takings'." Rather, the Sixth Circuit in *Pearson* noted that the district court's rationale "cannot be reconciled with current controlling precedent." 961 F.2d at 1214. The Sixth

Circuit went on to write that "the existence of such a [substantive due process] right is too well established to be gainsaid. The Supreme Court in recent years has at least thrice reaffirmed a general right of substantive due process, stating that the Due Process Clause contains a substantive component that bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them'." 961 F.2d at 1220. As the Sixth Circuit envisioned in *Pearson*, the Reserve here has pursued a proper claim against "arbitrary, wrongful government action." *Gamble* did not discuss "property interests" at all, but simply held, on the facts there, that failing to pursue state judicial remedies precluded plaintiff's takings and substantive due process claims. *Gamble* did acknowledge, however, that "[s]tatutes or other exertions of governmental power that lack a rational basis, in the sense of some connection however tenuous to some at least minimally plausible conception of the public interest, are held to violate due process even if there is no procedural irregularity; so if they deprive someone of life, liberty, or property, they give rise to a claim under the due process clause." 5 F.3d at 287. Again, *Gamble* supports, rather than undercuts, the Reserve's substantive due process claims.

The Town misplaces its reliance on *Collins v. City of Harker Heights*, 112 S.Ct. 1061 (1992). *Collins* simply held that a city employee has no remedy under Section 1983 because the city failed to train or warn its employees about known hazards. This Court suggested, however, that an employee *would have a claim "if . . .* the City had given an employee a particularly dangerous assignment *in retaliation for a political speech. . . . "* 112 S.Ct. at 1065.

This Court noted that the complaint did "not charge the city with a willful violation of Collins' rights" or that the city "*deliberately* harmed her husband." 112 S.Ct. at 1068-1069. This Court noted that due process was "intended to secure the individual from the *arbitrary* exercise of the powers of government;" "historically . . . due process has been applied to *deliberate* decisions of government officials to deprive a person of life, liberty, or property." 112 S.Ct. at 1069 n. 10. Here, the Town's actions have been retaliatory, arbitrary, and deliberate. Certainly, due process bars those actions.

The Town also attempts to rely on *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). *After a four-day bench trial*, the district court in *Ewing found* that there was *no evidence of* "bad faith, ill will or *other impermissible ulterior motives*," and "no arbitrary or capricious action." 106 S.Ct. at 510, 511. The issue, this Court noted, was "whether the record compels the conclusion that the university acted *arbitrarily*. . . . " 106 S.Ct. at 513. This Court suggested that the student would have had a claim had the regents "conceal[ed] . . . *constitutionally impermissible reasons* for expelling Ewing." 106 S.Ct. at 513. This Court noted that the university had dismissed 19 other students from the program without permitting any of them to take the standardized test. 106 S.Ct. at 515 n. 14. There simply is no conflict with *Ewing*. First, *Ewing* involved review of district court findings of fact, not of a summary judgment. Second, unlike in the subject case, there was no evidence of "impermissible ulterior motives" or "arbitrary and capricious" government action in *Ewing*. Third, the record here indicates that the

Reserve has been singled out, rather than being one of twenty students similarly treated, as in *Ewing*.

The Town has misplaced its reliance on *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1190-1120 (10th Cir. 1991). The Tenth Circuit in *Jacobs* recognized that a landowner has a substantive due process claim for decisions which are "arbitrary and capricious," but simply found that the landowners "did not allege facts sufficient to demonstrate that the commission's refusal to rezone appellants' property violated that standard." Here, on the other hand, the Reserve has filed almost 10,000 pages of depositions and exhibits "rife" with evidence that the Town has acted arbitrarily, capriciously, and retalitatorily in revoking the building permits.

The Town also has misplaced its reliance on *Shelton v. City of College Station*, 780 F.2d 475 (5th Cir. 1986). In *Shelton*, the Fifth Circuit noted that "[a]lthough finding that there might be some 'inferences,' 'allegations,' and 'a scintilla of evidence' in the record, the [district] court concluded that 'there [was] no evidence that the refusal to grant the variance . . . was arbitrary or capricious." 780 F.2d at 478. Here, the Eleventh Circuit observed that the record was "rife" with evidence that the Town mistreated Dr. Klauber and the Reserve.

The Reserve cannot understand the Town's reliance on *Scott v. Greeneville County*, 716 F.2d 1409 (4th Cir. 1983). The Fourth Circuit specifically held that "Scott's substantial expenditures in preparation for obtaining the permit and pursuing the then-conforming low-income housing project, coupled with prior official knowledge and informal approval of his intention to build such housing, more

than amply entitled him to claim a 'vested right' to a permit. . . . " 716 F.2d at 1418 n. 10. Further, the Fourth Circuit held that "[t]he record unequivocally establishes that Scott was deprived of his building permit by the extraordinary and unlawful intervention of the county's highest governing body into the issuance process." 716 F.2d at 1419. The Fourth Circuit went on to hold that, "even if [Scott] fails to prove racially discriminatory motivation, he has been denied due process of law . . . by manifest arbitrariness and unfairness." 716 F.2d at 1420-1421.

The Town claims at page 9 that the subject case would not invoke substantive due process analysis in the Second Circuit in light of *RRI Realty Corp. v. Incorporated Village of Southhampton*, 870 F.2d 911, 918 (2d Cir. 1989). *RRI Realty* simply held that an applicant for a building permit did not have a sufficiently clear entitlement to the permit to constitute a property interest. That, too, may have been the result in the Eleventh Circuit had the Reserve only been an applicant for a permit. But, as the Eleventh Circuit ruled, it was the Reserve's holding of the permit and multi-million dollar expenditures in reliance on the permit that gave rise to the property interest as a matter of Florida law (Town appendix at 10-14).

The Town claims the subject case "would have been summarily drummed out of federal court" in the Second Circuit and that the subject case would not invoke substantive due process analysis in the First Circuit (petition at 9). The Town is wrong. The Town fails to call this Court's attention to *Brady v. Town of Colchester*, 863 F.2d 205, 208, 215, 216 (2d Cir. 1988), *Gagliardi v. Village of*

Pawling, 18 F.3d 188, 194-195 (2d Cir. 1994), *Cordeco Development Corp. v. Santiago Vasquez*, 539 F.2d 256, 260 (1st Cir.), *cert. denied*, 429 U.S. 978 (1976), and *Jirau-Bernal v. Agrait*, 1994 WL 518147 (1st Cir. 1994). In *Brady*, the Second Circuit reversed a summary judgment because plaintiffs produced sufficient evidence to support their substantive due process claim arising out of the denial of permits in order to prevent plaintiffs from renting to a particular political party. In *Brady*, the Second Circuit specifically noted that "[i]n zoning dispute cases, the principle of substantive due process assures property owners of the right to be free from arbitrary or irrational zoning actions." 863 F.2d at 215. The Second Circuit in *Brady* was "mindful of the general proposition that 'federal courts should not become zoning boards of appeal to review nonconstitutional land use determinations,' " but also noted that "when a landowner's constitutional rights are infringed by local zoning actions, our duty to protect the constitutional interest is clear." 863 F.2d at 215. In reversing the summary judgment, the Second Circuit "[did] not suggest . . . that a wronged party has a valid claim for a constitutional deprivation every time a local zoning board makes an incorrect decision regarding a zoning permit," but that plaintiffs may have a constitutional claim where a permit is denied "because of indefensible reasons such as impermissible political animus." 863 F.2d at 216. In *Gagliardi*, the Second Circuit reinstated a complaint that the village's zoning enforcement actions "were motivated by or substantially caused by the Gagliardias' exercise of their First Amendment rights." In *Cordeco Development*, the First Circuit held that a landowner was denied due process where his permit was

denied "based on illegitimate political considerations," and where "there was ample evidence that [government officials] acted maliciously and wantonly, and with illegitimate political, or at least, personal motives." In *Jirau-Bernal*, the First Circuit just recently reaffirmed consistent and long-standing law that government cannot retaliate against citizens for exercising their constitutional rights.

Notwithstanding *Brady* and *Gagliardi*, the Town suggests that the Second Circuit has generally abandoned substantive due process and that this Court adopt the Second Circuit's analysis which supposedly "does not wholly abandon substantive due process analysis, but reserves it for truly egregious cases of abuse of governmental power" (petition at 11, see petition at 6). The Reserve would suggest that revoking and refusing to reinstate a building permit, thereby damaging a property owner well more than $6 million in out-of-pocket costs, in order to retaliate against the property owner for exercising his first amendment rights is, to put it mildly, a "truly egregious case of abuse of governmental power."

The Town further suggests that adopting what it perceives as the Second Circuit's analysis would somehow "greatly curtail the need for federal courts to delve into the quagmire of state laws which may be unclear in defining a property interest" (petition at 11). What the Town suggests is that this Court should overrule *Board of Regents v. Roth*, 408 U.S. 564 (1972). *Roth* has been applied for 22 years. Federal courts often decide questions of state law, whether in diversity cases or under *Roth*.

Finally, the other cases cited in the Town's petition similarly also do not conflict with the cases indicating

that the permit revocation here violated the Reserve's constitutional rights. *Smithfield Concerned Citizens v. Town of Smithfield,* 807 F.2d 239 (1st Cir. 1990), for example, concerned a facial substantive due process claim against a legislatively-adopted zoning ordinance applicable to large portions of the Town, rather than to action against one landowner to retaliate against the landowner for exercising his first amendment rights. In *Coniston Corp. v. Village of Hoffman Estates,* 844 F.2d 461, 467 (7th Cir. 1988), as another example, the Seventh Circuit, in affirming a dismissal, specifically pointed out that "[t]here is no suggestion that the defendants acted out *of some partisan political motive* that might raise questions under the First Amendment or, one of our sister courts has suggested recently, under some notion of substantive due process, *see Bello v. Walker,* 840 F.2d 1124, 1129 (3d Cir. 1988)." The Seventh Circuit went on in *Coniston* to note that "[o]f course if a zoning decision is based on considerations that violate specific constitutional guarantees, it is invalid," and that a zoning decision "can be said to deny substantive due process . . . if it is irrational." *Id.* Here, as the Eleventh Circuit observed, the record is "rife" that the Town "acted out of some partisan political motive" to harm Dr. Klauber.

3. The Eleventh Circuit's decision is fact-specific and very narrow.

The Town concedes that substantive due process applies "in truly egregious cases" (petition at 6), but argues that "[t]his case . . . does not meet any such

minimum threshold of a substantive due process violation" (petition at 7). Whether the subject case meets any such "minimum threshold" is particularly fact-sensitive. The Eleventh Circuit, in reviewing the 10,000-page record on the motion for summary judgment, found that the record was "rife" with the Town's unfairness and hostility to Dr. Klauber and the Reserve, and remanded to the district court for a fuller determination of whether the Town acted arbitrarily and capriciously or retaliatorily. Those determinations are particularly fact-sensitive and do not warrant granting the Town's petition for certiorari.

4. The Town's fears that federal courts have become "zoning boards of appeal" are hyperbole.

The Town fears that "[t]he Circuit Court's holding . . . usurps local permitting authorities of their democratic mandate and legislative power" and "unnecessarily entangles federal courts in the quagmire of sometime incoherent and undeveloped state law," and "ensures into perpetuity that federal courts act as zoning boards of appeal" (petition at 6). The Eleventh Circuit's holding is much, much more narrow. Even the Town acknowledges at page 6 that substantive due process should be applied "in truly egregious cases, not . . . involving the application of state or local discretion to land use issues." Given the Reserve's allegations and the Eleventh Circuit's observation that the record is "rife" with the Town's mistreatment of Dr. Klauber, this truly is an "egregious case," one "not involving the application of state or local discretion to land use issues." The Eleventh Circuit's holding merely ensures that a Town cannot retaliate

against a citizen for exercising his constitutional rights of free speech and political participation. The Town should have no more "discretion" to revoke a building permit, damaging a citizen more than $6 million, because it dislikes the citizen's speech and political participation, than should the Town be able to confiscate a citizen's real property because it dislikes the citizen's speech and political participation.

The Town claims that the "current state of the law results in a disruption of local government land use planning and zoning, unfairness and uncertainty to litigants across the county [sic], and the unnecessary entanglement of federal courts in state zoning and [land] use law" (petition at 6-7). The Reserve would suggest that the Town's "solution" here would result in substantially greater unfairness to a permitholder whose permit has been revoked due to the permitholder's exercise of his constitutional rights. The Reserve also would suggest that the subject case does not "unnecessar[ily] entangle . . . federal courts in state zoning and [land] use law." Rather, the subject case only ensures that federal courts continue their longstanding rule in protecting constitutional rights.

The Town also suggests that adopting the Second Circuit's analysis "w[ould] permit local permitting authorities to exercise their legislative prerogative without undue federal interference, and [would] prevent federal courts from sitting as zoning boards of appeal" (petition at 11). The lower federal courts, applying *Roth*, have permitted local bodies to exercise their "legislative prerogatives," and have refused to become zoning boards of appeal. Indeed, the cases cited at page 12 of the Town's

petition clearly prove that the federal courts have refused to become zoning boards of appeal. As the Sixth Circuit in *Pearson* noted, "[t]he vast majority of [challenges to state land use and zoning decisions] may readily be disposed of on summary judgment . . . thus keeping interference by federal courts with local government to a salutary minimum." 961 F.2d at 1222-1223. The federal courts must, however, be able to act where, as here, the government attempts to penalize the exercise of constitutional rights.

The Town fears that permitting plaintiffs, such as the Reserve, to raise claims that a government has retaliated against landowners will somehow "clog the overburdened federal court system" and that "every plaintiff who can scribble 'Fourteenth Amendment protectable property interest violation' on a complaint [can turn] a local dispute into a federal case" (petition at 12-13). The Town forgets 42 U.S.C. 1988 and FRCP 11 and overlooks the Sixth Circuit's observation in *Pearson* that "[t]he vast majority of [challenges to state land use and zoning decisions] may readily be disposed of on summary judgment. . . . " 961 F.2d at 1222-1223. Moreover, the Town's argument, if accepted, would apply to any constitutional claim – one can go into federal court simply by alleging that government action violates the Constitution. This Court, however, has never endorsed the proposition that, just because some meritless cases asserting constitutional rights may be brought in federal court, the remedy is to bar all cases asserting constitutional rights.

The Town claims that "not every violation of a state statute or local law creates a federal constitutional rights

case" (petition at 13) and that the Eleventh Circuit's holding will "usurp local permitting authorities of their democratic mandate" (petition at 6). The Reserve agrees that "not every violation of a state statute or local law" equates to a "constitutional claim." This case, however, involves retaliating against a property owner for exercising his constitutional rights, not a garden-variety claim for violating a local law. Neither *Chiplin Enterprises v. City of Lebanon*, 712 F.2d 1524, 1527 (1st Cir. 1983), nor *Amsden v. Moran*, 904 F.2d 748 (1st Cir. 1990), involved claims of retaliation. The Reserve certainly does not understand the Town's suggestion that a government may have a "democratic mandate" to act arbitrarily and capriciously and to retaliate against a citizen for exercising his constitutional rights.

Simply put, the Town's fears are only "fears" and do not logically indicate that this Court should grant the petition.

5. The Town's petition, at bottom, is a claim that the Eleventh Circuit erred in applying Florida law.

The Town claims that the Eleventh Circuit "wrongly held that the Reserve has a Fourteenth Amendment protectable property interest" (petition at 14). Not only does the Eleventh Circuit opinion and underlying case law indicate that it is the Town (rather than the Eleventh Circuit) which is wrong, but the Town ignores the fact that this Court does not exist to provide another appeal. *See, e.g.*, Supreme Court Rule 10; *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974). This is most assuredly so when the

point being contested involves a question of *state*, rather than federal, law. The Eleventh Circuit is well-situated to understand and apply the elements of equitable estoppel and property interests in Florida. Even assuming that the Eleventh Circuit erred, error correction on such issues would be an inappropriate use of this Court's limited docket.

In any event, however, the Eleventh Circuit did not err. Even if the Town were correct that "Florida law at least since 1945 has held that *possession* of a building permit does not create a protected property interest" and that "a *mere application* for a building permit d[oes] not create protected rights" (petition at 14), the Eleventh Circuit certainly was correct in specifically holding that "Florida courts have consistently held that a landowner has a property right in a building permit where the landowner possesses a building permit *and* where the circumstances that give rise to the doctrine of equitable estoppel are present" (Town appendix at 13). Indeed, the Town continues to overlook the language in *City of Boynton Beach v. Carroll*, 273 So.2d 171, 173 (Fla. 4th DCA), *cert. denied*, 279 So.2d 871 (Fla. 1973), that the Eleventh Circuit quoted that "possession of a building permit does not create a vested right . . . *in the absence of circumstances which would give rise to equitable estoppel*" (Town appendix at 13).

The Town also faults the Eleventh Circuit for relying on *Marine One II (Marine One, Inc. v. Manatee County*, 898 F.2d 1490 (11th Cir. 1990)), rather than on *Marine One I (Marine One, Inc. v. Manatee County*, 877 F.2d 892 (11th Cir. 1989)), because the Eleventh Circuit, as the Town puts it, never "overruled" *Marine One I*. The Eleventh Circuit in

Marine One II did, however, "clarify" *Marine One I* to limit *Marine One I* to permits for construction on publicly-owned lands, rather than to permits for construction on privately-owned lands, as is involved here.

The Town further attempts to rely on *Monroe County v. Hemisphere Equity Realty,* 634 So.2d 745 (Fla. 3rd DCA 1994), which simply held, as a matter of Florida law, that the failure to enforce an ordinance and an illegally-issued permit could not give rise to equitable estoppel. Here, it was the Town's affirmative actions in approving the site plans and in issuing the building permits, rather than a mere failure to act, which gave rise to the property interest as a matter of Florida law.

Finally, the Town claims that the Reserve's position is "identical" to the plaintiff's position in *Gross v. City of Riviera Beach,* 367 So.2d 648 (Fla. 4th DCA 1979). The Town is wrong. In *Gross,* there was no question that construction had ceased for substantially more than one year notwithstanding an ordinance providing that a building permit becomes void if construction ceases for 90 days. Here, construction had not ceased – the Reserve had workmen and equipment on-site. Moreover, there was no claim of retaliation in *Gross.*

6. The Town's claim that it did not act arbitrarily and capriciously is outside the scope of the question presented but, in any event, there certainly was sufficient evidence that the Town acted arbitrarily and capriciously to survive the Town's motion for summary judgment.

At page 17 of its petition, the Town strays from its one limited question to claim that the Eleventh Circuit

should have concluded that the Town did not act arbitrarily and capriciously. The Eleventh Circuit certainly was within its discretion in remanding that determination, in the first instance, to the district court in light of the 10,000-page record here. As pointed out at pages 2-6 above, there certainly was ample evidence that the Town acted arbitrarily and capriciously to survive the Town's motion for summary judgment. Even were the Eleventh Circuit wrong, however, this Court does not operate as a second appellate court. *See, e.g.*, Supreme Court Rule 10; *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974).

As further support for claiming that the Eleventh Circuit should have held that the Town did not act arbitrarily and capriciously, the Town points to the "presumption of validity" of the Town's actions (petition at 18). The Eleventh Circuit certainly dealt with any "presumption of validity" in light of its observation of the 10,000-page record being "rife" with examples of the Town's animosity toward the Reserve and Dr. Klauber (Town appendix at 4). Neither *Couf v. DeBlaker*, 652 F.2d 585, 588 (5th Cir. 1981), *cert. denied*, 455 U.S. 921 (1992), nor *South Gwinnett Venture v. Pruitt*, 491 F.2d 5, 7 (5th Cir. 1974) (en banc), *cert. denied*, 419 U.S. 837 (1974), nor *Sylvia Development Corp. v. Calvert County*, 842 F. Supp. 183 (D. Md. 1994), are inconsistent with the Eleventh Circuit's holding here. *Couf* recognized a cause of action for "arbitrary and capricious" zoning actions, but simply found that there was no evidence of irrationality there. There could be, and was, no claim in *Couf* that the downzoning was directed against a particular landowner for exercising his constitutional rights because the downzoning in *Couf* applied to all properties within 500 feet of the city's

waterfront. Similarly, *South Gwinnett* recognized a cause of action for "arbitrary and capricious" zoning decisions, but simply found that there was no evidence of arbitrary and capricious action there. The Fifth Circuit specifically noted that "upon a factual showing of arbitrariness there must be some basis in fact and law to justify the zoning action as consistent with reasonableness." Unlike in the subject case, in *South Gwinnett,* there was no evidence that the government had treated other property owners differently or had retaliated against the plaintiff for exercising its constitutional rights. *Sylvia Development* simply was *dictum* that, even if the landowner had a property interest, there was no arbitrary and capricious denial of the development permit on the record there. Once again, *Sylvia Development* did not involve a retaliation claim and it did not involve a case where the government approved the development as being consistent with the Town's comprehensive plan, the Town's zoning, and good design standards only to attempt to revoke the permit once the permitholder's political adversaries were elected.

7. Even were the Eleventh Circuit incorrect on whether Florida law recognizes a property interest here, the Reserve need not have a property interest where, as here, the government retaliates against a landowner for exercising constitutional rights.

Given the Reserve's proof that the Town revoked the building permit to retaliate against the Reserve for Dr. Klauber's constitutionally-protected conduct, the Reserve need not allege and prove an underlying property interest. *See, e.g., Rankin v. McPherson,* 483 U.S. 378, 384 (1987);

Perry v. Sindermann, 408 U.S. 593, 597 (1972). Thus, even were this Court to grant the petition for certiorari and agree with the Town that the Reserve has, as a matter of *state* law, no property interest, the case would still proceed to trial.

8. Even were this Court to grant the petition for certiorari and hold that the Reserve has no substantive due process claim for an arbitrary, capricious, and retaliatory revocation, trial would still proceed on the Reserve's equal protection claim.

The Town's arguments in its petition for certiorari are directed only at the Eleventh Circuit's holding on the Reserve's due process count. The Reserve also raised an equal protection count in Count III. The Eleventh Circuit agreed with the Reserve's argument that

> "the establishment of a constitutionally protectible property interest is wholly irrelevant to an equal protection claim. . . . An equal protection claim revolves around whether similarly situated persons are treated differently. . . . [The] Reserve noted several other developers in Longboat Key [were] allowed to retain their permits despite the fact that *no* work was accomplished on their projects for more than thirty days. Thus, Reserve created a disputed issue of fact regarding whether it had been treated differently than other similarly situated developers.
>
> "Longboat Key argues, however, that 'mere failure to pursue all offenders of an ordinance regulation is not grounds for a claim of denial of

> equal protection.' We have no quarrel with the law so stated. In order 'to prevail on a claim that defendant unequally applied a facially neutral statute, a plaintiff must show intentional discrimination.' Reserve contends that Longboat Key revoked its permit to retaliate against its principal, Dr. Klauber. There is record evidence to support that contention; a disputed fact, as to the reason for the revocation of Reserve's permit, remains. Accordingly, we conclude that the district court erred in granting summary judgment on Reserve's equal protection claim in Count III."

Thus, even were this Court to grant certiorari and to agree with the Town that the Reserve has no substantive due process claim, the subject case would still proceed to trial on the Reserve's equal protection claim.

CONCLUSION

For the foregoing reasons, this Court should deny the Town's petition for certiorari.

Respectfully submitted,

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